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14 UNITED STATES DISTRICT COURT  
15 EASTERN DISTRICT OF WASHINGTON

16 K.S. by her interim guardians ad litem,  
17 and DOROTHY SPIOTTA and PAUL  
18 SPIOTTA,

19 Plaintiffs,

20 v.

21 AMBASSADOR PROGRAMS, INC.,  
22 AMBASSADORS GROUP, INC., and  
23 PEOPLE TO PEOPLE INTERNATIONAL,

24 Defendants.

No. CV 08-243-FVS

MEMORANDUM IN SUPPORT  
OF DEFENDANTS' JOINT  
MOTION TO DISMISS  
PAUL AND DOROTHY  
SPIOTTA'S CLAIMS FOR  
DAMAGES FOR  
LOSS OF CONSORTIUM AND  
EMOTIONAL DISTRESS

## I. NATURE OF CASE & RELIEF SOUGHT

Plaintiffs seek nearly a million dollars from Defendants under Virginia law for alleged injury to the relationship between K.S. and her parents, Paul and Dorothy Spiotta. Since plaintiffs have not pled a cause of action under which those damages are recoverable, Defendants move under Federal Rule of Civil Procedure 12(b)(6) to dismiss those damages.

Assuming, for purposes of this motion, that the complaint is governed by Virginia law, as Plaintiffs allege, the complaint fails to state a plausible claim for Paul and Dorothy Spiotta because Virginia simply does not recognize a claim for loss of consortium. Although absent from the complaint, to the extent that Paul and Dorothy Spiotta intend to seek recovery for emotional distress damages separate from their alleged consortium loss, their complaint likewise fails to state a claim allowing recovery of those damages.

## II. STATEMENT OF RELEVANT FACTS

1. Plaintiffs' third amended complaint for damages (hereinafter "complaint") pleads causes of action for negligence, fraud, violation of the Consumer Protection Act, and breach of contract. (Ct. Rec. 75).

2. According to Plaintiffs, their negligence, fraud and violations of the consumer protection act are governed by Virginia law. (Ct. Rec. 75, at 17-18).

3. As damages for alleged negligence, fraud and violation of the Consumer Protection Act, Paul and Dorothy Spiotta seek to recover for "loss of companionship

1 with their child, and damage to the parent-child relationship.” (Ct. Rec. 75, at 9, 15, and  
2 16).

3 4. Plaintiffs’ operative complaint does not plead a cause of action for loss of  
4 consortium. (Ct. Rec. 75).

5 5. Neither Paul Spiotta nor Dorothy Spiotta seek the recovery of emotional  
6 distress damages in connection with any of the claims pled in Plaintiffs’ complaint. (Ct.  
7 Rec. 75, at 8-17).

8 6. According to Plaintiffs’ Rule 26 initial disclosures, Paul and Dorothy  
9 Spiotta seek \$960,000.00 in damages for “loss of companionship with [their] child and  
10 damage to the parent-child relationship and the associated emotional distress.”  
11 Plaintiffs’ First Supplemental Initial Disclosures, at 52-53 (Declaration of Geana M. Van  
12 Dessel, Ex. A).

### 13 III. ARGUMENT

#### 14 A. A COMPLAINT MUST BE DISMISSED WHEN IT FAILS TO STATE A PLAUSIBLE 15 CLAIM FOR RELIEF.

16 Pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must dismiss a claim  
17 where a complaint fails to “state a claim to relief that is plausible on its face.” *Bell Atl.*  
18 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1953  
19 (2009) (“Our decision in *Twombly* expounded the pleading standard for “all civil  
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24

1 actions[.]"). On its face, Plaintiffs' complaint fails to state a plausible claim under which  
2 Paul and Dorothy Spiotta could recover damages for loss of consortium and emotional  
3 distress.

4  
5 **B. PAUL AND DOROTHY SPIOTTA CANNOT RECOVER CONSORTIUM DAMAGES**  
6 **BECAUSE VIRGINIA DOES NOT RECOGNIZE A CAUSE OF ACTION FOR LOSS OF**  
7 **CONSORTIUM.**

8 Virginia law does not allow any causes of action for loss of consortium. *See* Va.  
9 Code § 55-36 and *Wolford v. Budd Co.*, 149 F.R.D. 127 (W.D.Va. 1993). In *Wolford*, the  
10 plaintiffs sought damages for the "loss of comfort, companionship, society and services  
11 suffered" by the wife of the injured plaintiff/husband. 149 F.R.D. at 128. The defendant  
12 moved to dismiss the plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(6)  
13 on the ground that the plaintiffs were seeking damages for loss of consortium, a claim not  
14 recognized in Virginia. 149 F.R.D. at 128-129, 132. The *Wolford* Court granted the motion  
15 to dismiss the consortium claim and limited the plaintiffs' recovery to the husband's  
16 injuries. Any loss that the wife may have suffered was dismissed, because "under the Code  
17 of Virginia and judicial interpretation thereof, neither spouse may recover for loss of  
18 consortium arising out of injury to the other spouse." *Id.*, at 1132.

19  
20  
21 Virginia has also held that the prohibition on general consortium damages extends  
22 beyond the loss of comfort, companionship and society. It also precludes a claim of special  
23 damages in the form of medical expenses of the non-injured spouse. *See Bolen v. Bolen*,

1 409 F.Supp. 1374 (W.D.Va. 1976) (dismissing husband's claim for hospital and medical  
 2 expenses incurred by him in connection with the injuries allegedly suffered by his wife and  
 3 for the loss of his wife's services or consortium because husband has no cause of action  
 4 under Virginia Code).

5  
 6 Last, there is no recognized cause of action for loss of consortium between a parent  
 7 and child under Virginia law. *See e.g., Kerstetter v. United States*, 57 F.3d 362, 364 (1995).  
 8 In *Kerstetter*, the parents filed a medical negligence action on behalf of their daughter. 57  
 9 F.3d at 364. The parents sought recovery for their own medical expenses as well as damages  
 10 for loss of services and emotional distress. *Id.* The court dismissed the parents' claims,  
 11 ruling that the parents could not bring a cause of action for emotional distress or loss of  
 12 companionship with their daughter under Virginia law. *Id.*

13  
 14 If, as Plaintiffs assert, Virginia law governs their claims, Paul and Dorothy Spiotta  
 15 cannot recover loss of consortium damages. The Court should dismiss Paul and Dorothy  
 16 Spiotta's claim for damages for loss of consortium.  
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18 **C. PAUL AND DOROTHY SPIOTTA CANNOT RECOVER THEIR LOSS OF CONSORTIUM**  
 19 **DAMAGES AS DISGUISED EMOTIONAL DISTRESS DAMAGES.**

20 **1. Plaintiffs' Complaint Does Not Seek Recovery of Emotional Distress**  
 21 **Damages for Paul or Dorothy Spiotta.**

22 Neither Paul nor Dorothy Spiotta allege any emotional distress damages under  
 23 Plaintiffs' operative complaint. *See supra*, Statement of Relevant Facts. Plaintiffs'  
 24

1 complaint does not give Defendants any notice that Mr. and Mrs. Spiotta intend to seek  
 2 recovery for emotional distress damages under any theory. *Id.* Despite the lack of  
 3 allegations in their complaint, however, Plaintiffs' Rule 26 initial disclosures suggest that  
 4 Mr. and Mrs. Spiotta intend to seek the recovery of emotional distress damages, separate  
 5 from their alleged consortium damages. *Id.* To the extent that Mr. and Mrs. Spiotta intend  
 6 to pursue emotional distress damages separate from their loss of consortium damages, or as  
 7 a subset thereof, Plaintiffs' complaint fails to state any plausible claim under Virginia law  
 8 allowing such recovery.  
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10  
 11 **2. Paul and Dorothy Spiotta Cannot Recover Emotional Distress Damages**  
 12 **Under Virginia Law Because They Did Not Suffer Any Physical Injury.**

13 Under Virginia law, the general rule is that damages for emotional distress "are not  
 14 recoverable unless they result directly from tortiously caused physical injury." *Naccash v.*  
 15 *Burger*, 290 S.E.2d 825, 830 (1982). The exception to the rule is intentional, reckless,  
 16 outrageous and intolerable conduct specifically intending to inflict emotional distress. *See*  
 17 *Womak v. Eldridge*, 210 S.E.2d 145, 147 (1974) and *Hughes v. Moore*, 197 S.E.2d 214  
 18 (1973).  
 19

20 In *Womak* the court stated the factors establishing the exception to the general rule  
 21 as follows:  
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1 . . . that a cause of action will lie for emotional distress, unaccompanied by  
 2 physical injury, provided four elements are shown: One, the wrongdoer's  
 3 conduct was intentional or reckless. This element is satisfied where the  
 4 wrongdoer had the specific purpose of inflicting emotional distress or where  
 5 he intended his specific conduct and knew or should have known that  
 6 emotional distress would likely result. Two, the conduct was outrageous and  
 intolerable in that it offends against the generally accepted standards of  
 decency. . . . Three, there was a causal connection between the wrongdoer's  
 conduct and the emotional distress. Four, the emotional distress was severe.

7 210 S.E.2d at 148. The *Womak* exception is clearly not applicable here because Plaintiffs'  
 8 complaint does not allege any of the four factors cited above.

9 In *Hughes*, the court allowed recovery for non-impact-related negligent infliction of  
 10 emotional distress, but only where physical injury resulted as manifested by objective  
 11 symptoms. 197 S.E.2d at 219. That exception is inapplicable because neither Paul nor  
 12 Dorothy Spiotta allege that they suffered any objective physical symptoms or injury as a  
 13 result of the Defendants' alleged wrongdoing. In the absence of any such direct physical  
 14 harm to Mr. and Mrs. Spiotta, they cannot recover for anxiety or emotional distress under  
 15 Virginia law.  
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#### 18 IV. CONCLUSION

19 Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants request a ruling  
 20 from the Court that Plaintiffs' operative complaint fails to state a plausible claim for  
 21 relief under Virginia law allowing Paul and Dorothy Spiotta to recover damages for loss  
 22 of consortium or associated emotional distress.  
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 24

1 DATED this 16th day of July 2009.

2 EVANS, CRAVEN & LACKIE, P.S.

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22 Counsel for Defendants Ambassador

23 Programs, Inc., & Ambassadors Group, Inc.



**CERTIFICATE OF SERVICE**

I hereby certify that on the 16th day of July, 2009:

1. I electronically filed the foregoing **Memorandum in Support of Defendants' Joint Motion to Dismiss Paul and Dorothy Spiotta's Claims for Damages for Loss of Consortium and Emotional Distress** with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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